

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 22, 2003

STATE OF TENNESSEE v. SPIKE HEDGEOTH

Appeal from the Criminal Court for Cumberland County

No. 6560 Leon C. Burns, Judge

No. E2002-01869-CCA-R3-CD

November 12, 2003

The defendant, Spike Hedgeoth, was convicted of three counts of theft of property valued at greater than \$10,000, class C felonies, and two counts of theft of property valued at greater than \$1,000, class D felonies. See Tenn. Code Ann. §§ 39-14-103, -105(3), (4). The trial court imposed a Range II sentence of ten years on each of the class C felonies and eight years on each of the class D felonies. The trial court ordered that all of the class C felony sentences and one of the class D felony sentences be served concurrently. The remaining class D felony sentence was to be served consecutively, for an effective sentence of eighteen years. In this appeal as of right, the defendant alleges (1) that the evidence is insufficient to support his convictions; (2) that the trial court erred by admitting into evidence audio recordings of telephone calls placed by the defendant from the Cumberland County jail; (3) that due to his intoxication, the defendant was unable to assist in his defense; and (4) that the sentence is excessive. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which NORMA MCGEE OGLE, J., joined. JOSEPH M. TIPTON, J., concurring in results only.

Larry M. Warner, Crossville, Tennessee, for the appellant, Spike Hedgeoth.

Paul G. Summers, Attorney General & Reporter; Elizabeth B. Marney, Assistant Attorney General; and Gary McKenzie and Anthony Craighead, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On the weekend following Friday, April 14, 2001, Richard Jones of Ray Bell Construction discovered that a 743-B Bobcat, valued at \$7500, and a set of lifting forks, valued at \$350, had been taken from a construction area. Later, the Bobcat was found in Crossville and returned.

On the following weekend, Mike Hicks, a job foreman at J. Hicks Excavating, discovered that a 1998 763 Bobcat and bucket, valued at \$14,500, and several attachments were missing. The attachments included a root rake, valued at \$6700, and a second bucket, having a purchase price of \$752. A set of Bobcat forks, a bucket, and a rock box were also taken. The Bobcat and related equipment were later recovered by police.

On April 29, 2001, Leroy Leary, general manager of Rental Service Corporation in Crossville, discovered that a 753 Bobcat, having a value of \$14,500, had been stolen from a construction site in Harriman. Later, a driver from Rental Service Corporation noticed the stolen Bobcat parked along Highway 70 with a "For Sale" sign on it.

On the same day, David Alexander of Bobcat of Knoxville learned that a 773 Bobcat, a soil preparator, and a trailer had been stolen from his business premises. The value of the Bobcat was between \$19,000 and \$20,000 and the value of the trailer was between \$2600 and \$3000. Later, the equipment was found in Cumberland County and returned.

At trial, Robert Mourey testified that he and his son-in-law, Kevin McCart, purchased two Bobcats from the defendant, one on April 14, 2001, and another eight days later. Mourey stated that the defendant had claimed that he was selling the equipment after closing a number of his construction sites. He recalled that he paid the defendant \$3500 each for the 743 and 763 Bobcats, \$1500 for the trailer, and \$500 for the forks.

Kevin McCart, Mourey's son-in-law, testified that between April 22 and April 30, 2001, he was involved in the purchase of four Bobcats from the defendant. According to McCart, the defendant had claimed that he was a partner in a construction firm that was going out of business. McCart testified that he had left one of the Bobcats at a feed store on Highway 70 because the owner had expressed an interest in purchasing it and that when he returned the following day, the Bobcat was being confiscated by the police. After informing the police that he had purchased the Bobcat from the defendant, he returned all of the other equipment he had acquired.

I

The defendant asserts that the evidence was insufficient to establish that he had actually committed any of the thefts. On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict

of guilt removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

Where the evidence is entirely circumstantial, the jury must find that the proof is not only consistent with the guilt of the accused but inconsistent with his innocence. There must be an evidentiary basis upon which the jury can exclude every other reasonable theory or hypothesis except that of guilt. Pruitt v. State, 3 Tenn. Crim. App. 256, 460 S.W.2d 385, 390 (1970). The trial court has the duty to charge the jury on the weight and significance of circumstantial evidence when it is the only basis upon which the state's case rests. Bishop v. State, 199 Tenn. 428, 287 S.W.2d 49, 52 (1956). The jury is governed by four rules when testing the value of circumstantial evidence: (1) The evidence should be acted upon with caution; (2) all of the essential facts must be consistent with the hypothesis of guilt; (3) the facts must exclude every other reasonable theory except that of guilt; and (4) the facts must establish such a certainty of guilt as to convince beyond a reasonable doubt that the defendant is the perpetrator of the crime. Marable v. State, 203 Tenn. 440, 313 S.W.2d 451, 456 (1958). Like all other fact questions, the determination of whether all reasonable theories or hypotheses are excluded by the evidence is primarily a jury question. State v. Tharpe, 726 S.W.2d 896 (Tenn. 1987); Marable, 313 S.W.2d at 457.

“A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner’s effective consent.” Tenn. Code Ann. § 39-14-103. Theft of property valued at more than \$10,000 but less than \$60,000 is a Class C felony. Id. § 39-14-105(4). Theft of property valued at more than \$1,000 but less than \$10,000 is a Class D felony. Id. § 39-14-105(3). “Value” is defined as follows:

- (i) The fair market value of the property . . . at the time and place of the offense; or
- (ii) If the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense.

Tenn. Code Ann. § 39-11-106(a)(36)(A). Owners are competent by fact of ownership to testify to the value of the property stolen. State v. Hamm, 611 S.W.2d 826 (Tenn. 1981); Reaves v. State, 523 S.W.2d 218, 220 (Tenn. Crim. App. 1975).

In this instance, Richard Jones of Ray Bell Construction testified that the 743 Bobcat and attachments had a value of \$7850. Mike Hicks of J. Hicks Excavating confirmed that a 763 Bobcat, valued at \$14,500, and attachments valued at over \$7000, were stolen from his company. Rental Service Corporation valued its stolen 753 Bobcat at \$14,500. David Alexander testified that a 773 Bobcat valued at a minimum of \$19,000 and a trailer valued at \$2600 were taken from his company. Each testified that the defendant did not have permission to take the Bobcats or related equipment. Within twenty-four hours of each theft, Robert Mourey and Kevin McCart purchased the stolen Bobcats and equipment from the defendant. The defendant claimed that he was selling the items to close several of his construction sites. The possession of recently stolen property raises an inference of guilt. See, e.g., State v. Bales, 585 S.W.2d 610, 612 (Tenn. 1979). This circumstantial evidence

established that the defendant had exercised control over the stolen items within hours after the thefts, was untruthful in his explanation of how he had acquired the equipment, and then sold the property for well under the market value. In our view, the jury acted within its prerogative by concluding that the state had met its burden of proof.

II

The defendant next contends that the trial court erred by admitting into evidence an audio tape of a telephone call placed by him while incarcerated at the Cumberland County Jail. He claims that the evidence was more prejudicial than probative because the jury was able to determine from the tape that he was in jail at the time of the conversation and complains that the evidence did not relate to any one of the thefts at issue. The state asserts that the defendant has waived this issue by failing to cite any authority or include any argument with regard to it.

Because the defendant indeed failed to cite any authority for his argument the issue must be deemed waived. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b). Furthermore, the defendant would not be entitled to relief upon the merits of the issue.

The audiotape is of a conversation between the defendant, who was incarcerated at the Cumberland County Jail on an unrelated charge, and an unnamed individual. The content of the tape includes a recorded voice informing the recipient that the call is being made by an inmate at the Cumberland County Jail. Although much of the conversation which follows is inaudible, the defendant does instruct the recipient of his call to "get the other," using the defendant's truck and chains. The defendant also directs the individual to have the defendant's girlfriend drive him to the location and to otherwise work alone. At one point, the defendant says, "It has to be done on Sunday," and, at another, that the "the cat and the hoe" should be sold for \$6500. Throughout the conversation, the defendant laments his legal woes, asks for money to pay his attorney, and states that he will likely be incarcerated for at least six months.

To be admissible, audiotapes, like photographs, must be relevant to some issue at trial. See Tenn. R. Evid. 401. An audiotape may be excluded, however, if its probative value is substantially outweighed by its potential to unfairly prejudice the defendant or to confuse or mislead the jury. See Tenn. R. Evid. 403. The admissibility of evidence is a matter within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. State v. Harris, 839 S.W.2d 54, 66 (Tenn. 1992).

That the defendant was in jail should have been redacted from the tape. There was prejudice to the defendant when the recorded voice established that the call originated from the county jail. The trial court did issue curative instructions just after the tape was played directing the jury not to infer guilt because the defendant was in jail at the time of the call. Under our law, jurors are presumed to follow such instructions. See State v. Smith, 893 S.W.2d 908, 914 (Tenn. 1994); State v. Woods, 806 S.W.2d 205, 211 (Tenn. Crim. App. 1990). In the context of the entire trial and when viewed in conjunction with the curative instructions, it is our view that the failure to redact that portion of the audiotape making reference to the defendant's incarceration qualified as harmless,

having no effect on the verdicts of guilt. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). Although the evidence was largely circumstantial, the proof of guilt on each count was particularly compelling.

More troubling, however, is that the content of the tape did not necessarily relate to any of the thefts at issue. See Tenn. R. Evid. 401. The state contended at trial that because the defendant was explaining how to steal a Bobcat, it was admissible to show a common scheme or plan. Generally, evidence of other crimes, wrongs or acts is not admissible to establish a defendant's propensity or character and may only be admitted to show "the motive of the defendant, intent of the defendant, the identity of the defendant, the absence of mistake or accident if that is a defense, and rarely, the existence of a larger continuing plan, scheme, or conspiracy of which the crime on trial is a part." State v. Toliver, __ S.W.3d __, No. E2001-00584-SC-R11-CD (Tenn. October 2, 2003) (quoting State v. Gilliland, 22 S.W.3d 266, 271 n.6 (Tenn. 2000)); see also Tenn. R. Evid. 404(b).

"[T]here are three types of common scheme or plan evidence: (1) offenses that reveal a distinctive design or are so similar as to constitute 'signature' crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction." State v. Shirley, 6 S.W.3d 243, 248 (Tenn. 1999) (citing Neil P. Cohen et al., Tennessee Law of Evidence § 404.11 (3d ed. 1995)). While it is unclear which category was utilized by the trial court, the argument made by the state at trial implies that it was relying on the distinctive design or "signature" crimes category. Our supreme court has consistently held that "identity is usually the only relevant issue supporting admission of other offenses when the theory of the common scheme or plan is grounded upon a signature crime." See, e.g., State v. Moore, 6 S.W.3d 235, 239 (Tenn. 1999). Identity was not an issue in this case. McCart and Mourey testified that it was the defendant who sold them the stolen Bobcats and the defendant did not deny doing so. Moreover, the evidence would not fit into the two remaining categories. It is our view that the trial court erred by admitting the conversation as evidence of a common scheme or plan.

Further, other portions of the tape suggest that the probative value of the evidence was substantially outweighed by unfair prejudice. See Tenn. R. Evid. 403. The defendant's tone of voice, his reference to other crimes, his cursing, and his use of racial epithets, all irrelevant to the issues at trial, reflected poorly on the defendant, who had chosen not to testify, as was his right. Again, however, any error in the admission of the audiotape would qualify as harmless. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b). Proof of the defendant's participation in each of the crimes in question was overwhelming and largely undisputed. Despite the erroneous admission of the tape, it is our assessment that in the context of the entire record of the trial, the verdicts were unaffected.

III

The defendant next contends that the trial court erred by refusing to rule that he was incompetent to stand trial. In Dusky v. United States, 362 U.S. 402 (1960), the Supreme Court ruled that the defendant is competent if he has sufficient ability to consult with his lawyer with a

reasonable degree of rational understanding and a reasonable and factual understanding of the proceedings. In Mackey v. State, 537 S.W.2d 704 (Tenn. Crim. App. 1975), this court determined that the defendant must be able to understand the nature and object of the proceedings against him, must be able to consult with counsel, and must be able to assist in the preparation of his defense.

The burden is on the defendant to establish his incompetency to stand trial by a preponderance of the evidence. State v. Oody, 823 S.W.2d 554 (Tenn. Crim. App. 1991). The determination of competency is within the sound discretion of the trial court. State v. Howard, 926 S.W.2d 579 (Tenn. Crim. App. 1996).

In this instance, defense counsel informed the trial court on the day of trial that he believed the defendant to be intoxicated. The trial court questioned the defendant, who admitted that he had taken Benadryl but denied taking any other drugs or alcohol. Further, the defendant insisted that he was prepared for trial and that he could assist in his defense. Based upon those representations, the trial court permitted the proceeding to go forward. Later, at the sentencing hearing, the defendant claimed that he was unable to assist his counsel because he was on drugs. Other than his bare claim, no further proof was presented to suggest any inability to assist in his defense during the course of the trial. In our view, the record supports the finding of the trial court. The defendant was responsive when questioned by the trial judge and indicated a readiness to stand trial.

IV

As his final issue, the defendant complains that the trial court erred by ordering consecutive sentencing. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a Class B, C, D, or E felony conviction, the presumptive sentence is the minimum in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the

sentence above the minimum, but still within the range. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence must then be reduced within the range by any weight assigned to the mitigating factors present. Id.

The trial court imposed a sentence of ten years for each of the three convictions for theft over \$10,000 and a sentence of eight years for each of the two convictions for theft over \$1,000. The court also ordered that one of the eight-year sentences be served consecutively to the others for an effective sentence of eighteen years.

The trial court first determined that the defendant qualified as a Range II, multiple offender and then concluded that enhancement factor (2), that the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, was applicable to all of the convictions. See Tenn. Code Ann. § 40-35-114(2) (Supp. 2002). The trial court also applied enhancement factor (9), that the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. See Tenn. Code Ann. § 40-35-114(9) (Supp. 2002). In addition, the trial court applied enhancement factor (14), that the felony was committed while the defendant was on probation. See Tenn. Code Ann. § 40-35-114(14) (Supp. 2002). In mitigation, the trial court found that the defendant's conduct neither caused nor threatened serious bodily injury, see Tenn. Code Ann. § 40-35-113(1), but gave that factor very little weight.

The trial court imposed consecutive sentencing on the following grounds:

[The defendant] does have an extensive criminal history, by his own admission. Basically, he's a professional criminal. And he was on probation, in this court's opinion.

So, . . . the first four counts would run concurrent, and Count 5, which occurred the last two weeks of April, an eight year sentence would be consecutive, for an effective eighteen year sentence. And . . . because of the fact that it is not an injury crime, or violent crime, I would not run them all consecutive. I don't think it justifies that.

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case, our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

[C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria¹ exist:

- (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

The length of the sentence, when consecutive in nature, must be “justly deserved in relation to the seriousness of the offense,” Tenn. Code Ann. § 40-35-102(1), and “no greater than that deserved” under the circumstances, Tenn. Code Ann. § 40-35-103(2); State v. Lane, 3 S.W.3d 456 (Tenn. 1999).

Here, the defendant was convicted of five offenses. The proof presented at trial and at the sentencing hearing established that the defendant had been in the business of selling stolen property for quite some time. By the defendant's own admission, he would buy and sell anything, regardless of the source. The presentence report indicated that the defendant claimed to have been in "the

¹The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

carpet cleaning business" for approximately eight years but had not paid any income tax. Other jobs included "the rock hauling business," selling pork rinds at county fairs, cutting firewood, and small construction. The defendant has some fourteen prior convictions for offenses including hindering a secured creditor, forgery, driving under the influence, passing worthless checks, possession with intent to sell more than 30 grams of cocaine, conspiracy to sell cocaine, and public intoxication. In addition, copies of the defendant's convictions for forgery establish that he was on probation when the instant offenses were committed.

In our view, the evidence established that the defendant had an extensive criminal history and also qualified as a professional criminal. See, e.g., State v. Desirey, 909 S.W.2d 20 (Tenn. Crim. App. 1995). That he was on probation when two of the offenses were committed is a further basis for consecutive sentencing. See Tenn. Code Ann. § 40-35-115(b)(6). Thus, the trial court did not abuse its discretion by ordering consecutive terms.

Accordingly, the judgments of the trial court are affirmed.

GARY R. WADE, PRESIDING JUDGE